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2001

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Utah Supreme Court

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DEC 6 1975

OF THE BRIGHAM YOUNG UNIVERSITY  
STATE OF UTAH Reuben Clark Law School

IN THE MATTER OF STATE OF  
UTAH, IN THE INTEREST OF  
NATHAN DAVID MORGAN, A  
PERSON UNDER 18 YEARS OF  
AGE,

NATHAN DAVID MORGAN,

*Appellant.*

Case No.

~~13452~~

13542

BRIEF OF RESPONDENT

APPEAL FROM THE JUDGMENT OF THE DIS-  
TRICT JUVENILE COURT FOR WEBER COUNTY,  
HONORABLE L. ROLAND ANDERSON, JUDGE,  
PRESIDING.

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M. REID RUSSELL  
Chief Assistant Attorney General  
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FILED

3281974

*Clerk, Supreme Court, Utah*

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IN THE  
**SUPREME COURT**  
OF THE  
**STATE OF UTAH**

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IN THE MATTER OF STATE OF UTAH, IN THE INTEREST OF NATHAN DAVID MORGAN, A PERSON UNDER 18 YEARS OF AGE, NATHAN DAVID MORGAN, <i>Appellant.</i>	}	Case No. 13452
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**BRIEF OF RESPONDENT**

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**STATEMENT OF THE NATURE OF THE CASE**

This is an interlocutory appeal from a judgment of the District Juvenile Court for Weber County, State of Utah.

**DISPOSITION IN THE LOWER COURT**

The Honorable L. Roland Anderson, Judge of the District Juvenile Court, Weber County, State of Utah, granted appellant's motion for issuance of a certificate to secure the attendance of a nonresident witness, but

denied that portion of the motion pertaining to payment of fees by the State of Utah or its subdivisions.

### RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the lower court's order.

### STATEMENT OF FACTS

Respondent will stipulate to appellant's statement of facts as being generally correct.

### ARGUMENT

#### POINT I.

THE RIGHT OF A DEFENDANT TO SECURE A WITNESS AT STATE EXPENSE THROUGH THE "UNIFORM ACT TO SECURE THE ATTENDANCE OF WITNESSES FROM WITHOUT A STATE IN CRIMINAL PROCEEDINGS" IS NOT ABSOLUTE; RATHER, IT IS DISCRETIONARY WITH THE TRIAL COURT.

The earlier cases which construed the "Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings," Utah Code Ann. § 77-45-11 et seq. (1953), as amended, (hereinafter "Uniform Act"), denied the obligation of the State to procure defense witnesses at state expense:

"... it is clear that this statute, providing as it does, that specified sums for fees and mile-

age shall be paid or tendered to nonresident witnesses summoned to attend and testify in criminal prosecutions in this state, but not providing, either expressly or by implication, that such witnesses summoned on behalf of the defendant shall be brought in without expense to him, does not confer upon the courts of this state authority to procure the attendance and testimony of witnesses from without the state for the defendant in any case at the expense of the public." *State v. Fouquette*, 67 Nev. 505, 221 P. 2d 404 (1950), *cert. denied*, 71 S. Ct. 799, 341 U. S. 932, 95 L. Ed. 1361.

See also *State v. Swenson*, 243 Minn. 24, 66 N. W. 2d 1 (1954); *State v. Blount*, 200 Or. 35, 264 P. 2d 419 (1954), *cert. denied*, 74 S. Ct. 711, 347 U. S. 962, 98 L. Ed. 1105. Since those decisions, federal constitutional standards have been refined to the point where as a matter of due process of law an indigent defendant has the right to compulsory process at state expense, *Griffin v. People Of The State of Illinois*, 351 U. S. 12, 76 S. Ct. 585, 100 L. Ed. 891 (1956); *Washington v. Texas*, 388 U. S. 14, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967). However, that right is circumscribed by two prerequisites in that the defendant must show the materiality of the proposed witnesses's testimony, and he must give proof of indigence, Federal Rules of Criminal Procedure, 17(b); 18 U. S. C. A.; *Findley v. United States*, 380 F. 2d 752 (1967); *United States v. Sprouse*, 472 F. 2d 1167 (C. A. Tenn. 1973), *cert. denied*, 93 S. Ct. 2164, 411 U. S. 970, 36 L. Ed. 2d 693.

The grant of compulsory process by the "Uniform Act" to obtain nonresident witnesses has uniformly been held to be at the discretion of the trial court:

"It follows that it also is a reasonable interpretation of the Act that discretion is placed in the trial judge to decide whether a certificate should issue. If the rule were otherwise, a defendant, by claiming materiality of witnesses might make so many demands for their attendance that expense and delay would seriously impede or prevent the administration of justice." *State v. Smith*, 458 P. 2d 687 (Or. App. 1969).

See also *State v. Mance*, 7 Ariz. App. 269, 438 P. 2d 338 (1968); *State v. Schaffer*, 70 Wash. 2d 124, 422 P. 2d 285 (1966); *People v. Nash*, 36 Ill. 2d 275, 222 N. E. 2d 473 (1967).

The Utah Court has recognized the discretionary nature of the "Uniform Act" in *State v. Leggroan*, 15 Utah 2d 153, 389 P. 2d 142 (1964):

"... the permissive tenor of the Act have led the courts, wherever the problem has arisen, almost unanimously to conclude that the Act, as to production of witnesses, may be helpful in a given case, permissive in nature, *but not mandatory*." (Emphasis added.)

The trial judge in this instance was not obligated to procure a defense witness at state expense without a showing of both materiality and indigence.



## POINT II.

THE TRIAL JUDGE DID NOT ABUSE HIS DISCRETIONARY POWER IN GRANTING A CERTIFICATE TO SECURE THE ATTENDANCE OF A NONRESIDENT WITNESS, BUT DENYING FEES FOR THAT WITNESS.

Appellant argues that if the compulsory process of the "Uniform Act" is implemented for the defendant, the state is obligated to pay a witnesses' fees and mileage. Manifestly, the "Uniform Act" is not mandatory as to securing defense witnesses at state expense nor has the law evolved to demand such. Originally, the state denied any obligation to pay fees for defense witnesses, *State v. Fouquette, supra*, and this was despite the language of the "Uniform Act" which is seemingly mandatory. Today, it would appear that, abiding by constitutional standards, the State is only obligated to pay for defense witnesses when those witnesses are material and the defendant is financially unable to procure them himself.

The section of the "Uniform Act" which appellant relies upon, Utah Code Ann. § 77-54-14 (1953), as amended, *does not* provide a procedure for paying fees and mileage of defense witnesses, but is restricted to witnesses for the prosecution:

"Whenever a judge of a court of record of this state shall issue a certificate under the provisions of Section 77-45-73 *to obtain the atten-*

*dance of a witness for the prosecution from without this state in a criminal prosecution . . ."*  
(Emphasis added.)

The appellant, in this instance, apparently pled facts which suggested that the witness might give some testimony of probative value (R. 6), but he did not support, at least as far as the record shows, his naked allegation that he was unable to pay costs. It would be well within the trial court's discretion to deny fees and mileage expenses where there was no showing of materiality of the testimony and indigence of the defendant to justify their payment at State expense.

### CONCLUSION

Respondent submits that under the "Uniform Act" and constitutional law the state is required to pay for securing defense witnesses only under limited circumstances, and as it appears that appellant did not meet that criteria, his motion was properly denied. Respondent prays that the Court affirm the lower court's order.

Respectfully submitted,

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